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No. 79-1157

In the Supreme Court of the United States

OCTOBER TERM, 1979

EDWARD J. ROSEWELL, etc., et al.,
Petitioners,

vs.

La SALLE NATIONAL BANK, Trustee, etc.,
Respondent.

On Writ of Certiorari To The United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT

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Questions Presented

1. Whether the District Court has subject matter jurisdiction under 28 U.S.C. §1343(3) in a suit brought under 42 U.S.C. §1983, challenging constitutionally discriminatory real estate assessment by county taxing officials.

2. Whether taxpayer's complaint states a cause of action under 42 U.S.C. §1983.

3. Whether the Court of Appeals was correct in holding that the denial of interest on tax refunds by the Illinois courts renders the state remedy not "plain, speedy and efficient" and hence lifts the bar of 28 U.S.C. §1341 in an action seeking to enjoin collection of that portion of a real estate tax based on a discriminatory assessment.

4. Whether the Court of Appeals was correct in holding that the possible availability of an action under 42 U.S.C. §1983 in the Illinois courts does not, by virtue of 28 U.S.C. §1341, bar a §1983 action in the federal courts.

Parties in the Court Below

The parties in the court below were:

LaSalle National Bank, Trustee under Trust No. 44891[1]
Edward J. Rosewell, Treasurer of Cook County
Thomas M. Tully, Assessor of Cook County

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[1] Although LaSalle National Bank, Trustee under land trust No. 44891 is the named respondent, Patricia Cook, as sole beneficiary under the trust, is the real party in interest. A 2-3.

References are:

A: petitioners' separate Appendix
Br: petitioners' brief
Br. A: the Appendix bound in with petitioner's brief
Pet: the petition for writ of certiorari.

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No. 79-1157

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Petitioners,

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Respondent.

On Writ of Certiorari To The United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT

Constitutional and Statutory Provisions Involved

In addition to constitutional and statutory provisions set out in petitioners' brief, this case involves Section 1 of the Fourteenth Amendment to the federal Constitution which provides in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The statement of the case by the Court below, *LaSalle National Bank* v. *Rosewell,* 604 F.2d 530, 531-2 (7th Cir. 1979); Pet. 1a-4a, suffices for purposes of the present review with the following additions.

Petitioners' discrimination against taxpayer has continued during the pendency of this suit. The Assessor fixed the 1978 and 1979 assessments at the 1977 level despite complaints filed both before the Assessor (for 1978) and the Board of Appeals of Cook County (for both years). Taxpayer's request for relief from the 1978 assessment is pending in the District Court. See *LaSalle* v. *Rosewell,* No. 79 C 4864. At the same time the Illinois Legislature, as in earlier years, e.g. HB. 1879 and SB. 1061, 78th Gen. Ass. (1973 Session), has declined to adopt bills which would allow interest on tax refunds. See, e.g. HB. 451 and HB. 1317, 81st Gen. Ass. (1979 Session).

SUMMARY OF ARGUMENT

A system of assessment of real property which purposefully and systematically overassesses certain taxpayers violates the Fourteenth Amendment and gives rise to a cause of action under 42 U.S.C. §1983. The present taxpayer has been a victim of this systematic discrimination for at least six years and has adequately stated a claim for which relief against this discrimination can be granted under §1983.

Federal jurisdiction for taxpayer's claim exists under 28 U.S.C. §1343(3) in that this claim involves abridgement of a constitutional provision securing equal rights and under *Lynch* v. *Household Finance Corp.,* 405 U.S. 538 (1972), such a right, even though rooted in a property interest, is fully cognizable under §1983 and §1343(3).

Taxpayer's §1983 action in federal court is not barred by 28 U.S.C. §1341, which proscribes restraint of state

taxes by federal courts when the state provides a plain, speedy and efficient remedy. The only state court remedy for the deprivation complained of here requires payment of the challenged tax in full and a suit for refund. This remedy, however, is inadequate because refunds paid under it do not bear interest. A correct reading of §1341, its legislative history and pertinent case law and equity principles demonstrate that such inadequacy lifts the bar of §1341.

It is no answer to the inadequacy of the Illinois remedy to say that a §1983 action might possibly be brought in the courts of Illinois. To make §1341 applicable, the adequacy of the Illinois remedy must be certain. Yet it is far from certain that Illinois courts would entertain, and grant the injunctive relief sought in taxpayer's present suit. Moreover, the assumptions which must be made to reach a conclusion that the Illinois courts would grant such relief are so contrary to the purposes of §1341 and §1983 as clearly to be against Congressional intent.

Absent the district court's exercise of the jurisdiction created by § 1343(3) for use in connection with federal civil rights claims, it is clear that taxpayer and countless others will continue to suffer from discrimination in tax assessments which in Cook County has contributed so heavily to urban decay[2] and placed that county 99th on the list of 102 Illinois counties in accuracy and hence fairness of assessments.[3]

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[2] *Biasco Musical Instrument Co., et al.* v. *Cullerton, et al.*, No. 72 C 1224 (N.D. Ill. Decision and Order Jan. 23, 1973, p. 5) ("Disparity in the administration of tax laws can cause chronic and perhaps irremediable blight in a large metropolitan area such as Cook County."); *Hamer* v. *Lenhausen*, 60 Ill. 2d 400, 411 (1975) (Kluczynski dissenting).

[3] See *Chicago Tribune*, Jan. 28, 1979, Sect. 1, p. 16, citing U.S. Census Bureau Report on Real Estate Assessments.

(Emphasis added unless otherwise indicated)

ARGUMENT

I.

The District Court Had Jurisdiction Under 28 U.S.C. §1343(3)[4]

Tax litigants like all others who desire to enter the federal courts must establish a proper jurisdictional basis for it is a "well-established principle that federal courts . . . are courts of limited jurisdiction." *Aldinger* v. *Howard,* 427 U.S. 1, 15 (1976). Hence, prior to this Court's re-affirmation in *Lynch* v. *Household Finance Corp.,* 405 U.S. 538 (1972) that "rights in property are basic civil rights", *Id.* at 552, cognizable under §§1983 and 1343(3), tax litigants relying solely on §1343(3) for access to the federal courts were routinely turned away for want of jurisdiction. See, e.g., *Hornbeak* v. *Hamm,* 283 F. Supp. 549 (M.D. Ala), *aff'd per curiam,* 393 U.S. 9 (1968); *Gray* v. *Morgan,* 371 F.2d 172 (7th Cir. 1966), *cert. denied,* 386 U.S. 1033 (1967). With *Lynch's* explicit rejection of a distinction between property and personal rights, loss of property through discriminatory taxation in violation of the Fourteenth Amendment falls within the ambit of §1983 and §1343(3) and post-*Lynch* courts have so held. *Garrett* v. *Bamford,* 538 F.2d 63 (3d Cir.), *cert. denied,* 429 U.S. 977 (1976); *Weissinger* v. *Boswell,* 330

[4] Petitioners did not present this question in their petition for writ of certiorari or in the court below and hence improperly argued it in their brief. Rule 34(1)(a).

F. Supp. 615 (M.D. Ala. 1971) (three judge court); *Cf. Fulton Market Cold Storage Co.* v. *Cullerton,* 582 F.2d 1071 (7th Cir. 1978), *cert. denied,* 439 U.S. 1121 (1979); *McCarthy* v. *Jones,* 449 F. Supp. 480 (S.D. Ala. 1978); *North American Cold Storage Co.* v. *County of Cook,* 468 F. Supp. 424 (N.D. Ill. 1979).

Petitioners, however, contend that the following language in *Lynch,* n. 6 indicates this Court's view that §1343(3) jurisdiction is nonetheless foreclosed in state revenue cases, Br. 21-3:

> "Congress has treated judicial interferences with the enforcement of state tax laws as a subject governed by unique considerations and has restricted federal jurisdiction accordingly [citing 28 U.S.C. §1341]. . . . We have repeatedly barred anticipatory adjudication of the validity of state tax laws. . . . The decisions cited by appellees may, therefore, be seen as consistent with congressional restriction of federal jurisdiction in this special class of cases, and with long-standing judicial policy."

Rather than foreclosing state tax matters from the reach of §1343(3), this statement does no more than confirm the continued applicability of §1341 notwithstanding the elimination of the property-personal rights distinction. Comment, *Racial Discrimination and the Tax Injunction Act,* 90 Harv. L. R. 616, 623-4 n. 49 (1977). More specifically, it was clear before *Lynch* and it remains clear today that federal jurisdiction to enjoin the assessment levy or collection of a state tax is barred when the state provides a plain, speedy and efficient remedy for the wrong complained of even though, but for §1341, federal jurisdiction over the claim would otherwise exist under

§1343(3) or for that matter under 28 U.S.C. §§1331 and 1332 or any other jurisdictional predicate.[5]

The earlier decisions mentioned in *Lynch,* n. 6, and cited by petitioners, Br. 22, are fully consistent with this view. In *Carter* v. *Greenhow,* 114 U.S. 317 (1885) and *Pleasants* v. *Greenhow,* 114 U.S. 323 (1885) certain taxpayers brought civil rights damage actions against a city treasurer alleging that the latter's failure to accept coupons from state bonds in payment of taxes constituted an impairment of contract rights secured by Article 1, Sec. 10 of the Constitution. This Court affirmed the circuit court's dismissal of the action not on the grounds that the Civil Rights Act does not extend to cases involving state taxes but because the abridgment alleged did not offend the Contract Clause:

> "In any judicial proceeding necessary to vindicate his rights under a contract, affected by legislation, the individual has a right to have a judicial determination, declaring the nullity of the attempt to impair its obligation. This is the only right secured to him by that clause of the Constitution. But of this right the plaintiff does not show that he has been deprived. He has simply chosen not to resort to it." 114 U.S. at 223.

In *Holt* v. *Indiana Manufacturing Co.,* 176 U.S. 68 (1900) a taxpayer brought an action to enjoin an allegedly unconstitutional imposition of state taxes on its patent rights. This Court held that the lower federal court lacked jurisdiction to hear the cause under the Civil Rights Act because abridgment of property rights, which would include

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[5] *Czajkowski* v. *State of Ill.,* 460 F.Supp. 1265 (N.D. Ill. 1977), *aff'd unpubl'd order,* 588 F.2d 839 (7th Cir. 1978) Br. 22-3, clearly misreads *Lynch,* n.6, to hold that §1343(3) will *never* be available in cases involving collection of state taxes. *Lynch* bars §1343(3) only insofar as §1341 can be successfully invoked, i.e., "where there is an adequate remedy in state courts." *The Supreme Court 1971 Term,* 86 Harv. L. Rev. 52, 205 (1972).

rights involving state taxation, was deemed outside the protection of the Act: the Civil Rights Act provisions "refer to *civil* rights only, and are inapplicable here." *Id.* at 72. *Holt* contains no intimation that the tax as distinguished from the property aspect of the subject matter in issue was thought to be controlling by the Court. Chief Justice Stone's opinion in *Hague* v. *Committee For Industrial Organization,* 307 U.S. 496 (1939), a case involving alleged infringements of First Amendment rights, reiterates the distinction drawn in *Holt* and rejected in *Lynch*:

> "[W]henever the right or immunity is one of personal liberty, *not dependent for its existence upon infringement of property rights,* there is jurisdiction in the district court under [the Civil Rights Act] . . . to entertain . . . [an action to secure] it without proof that the amount in controversy exceeds [the amount required by 28 U.S.C. 1331's predecessor]." 307 U.S. at 531-2.

In sum, the thrust of footnote 6 in *Lynch* is simply that when "§1341 is inapplicable, the exception [to §1343(3) jurisdiction] alluded to in the footnote in *Lynch* is likewise inapplicable."[6] *Fulton Market Cold Storage Co.* v. *Cullerton, supra,* 582 F.2d at 1079.

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[6] This case involves a claim of invidiously disparate treatment directly violative of equal rights entitlements secured by the Fourteenth Amendment, see e.g., *Sunday Lake Iron Co.* v. *Wakefield,* 247 U.S. 350 (1918); *Raymond* v. *Chicago Union Traction Co.,* 207 U.S. 20 (1907), and hence falls squarely within the embrace of §1343(3) which authorizes federal jurisdiction to redress the deprivation "of any right . . . secured by the Constitution . . . or by any Act of Congress providing for equal rights." Questions regarding the reach of §1343(3) in cases of statutory abridgements or violations of other constitutional denials, see e.g., *Chapman* v. *Houston Welfare Rights Organization,* 441 U.S. 600 (1979) are not presented here. Likewise not before the court is the relationship between §1983 and §1343(3). See *Maine* v. *Thiboutat,* 48 L.W. 4859 (June 25, 1980).

Nothing in the legislative history of the Civil Rights Act supports petitioners' contrary view. Nor is "any such contraction of 1343(3) jurisdiction . . . supported by the legislative history of 1331." *Lynch* v. *Household Finance Corp.*, 405 U.S. at 547-8.[7] Moreover, what this court has said regarding the factoring out of property rights generally from the class of rights covered by the Civil Rights Act applies equally to petitioners' attempt here to factor out tax matters from the larger class of property rights now concededly embraced by §1343 and §1983:

> "The 'cardinal rule . . . that repeals by implication are not favored' . . . thus counsels a refusal to pare down §1343(3) jurisdiction—and the substantive scope of §1983—by means of the distinction between personal liberties and property rights, *or in any other way.*" Id. at 549.

Given the "expansive sweep", *Owen* v. *City of Independence,* ..... U.S. ....., 63 L. Ed. 2d 673, 684 (1980), and "broad" remedial character, *Monell* v. *New York City Department of Social Services,* 436 U.S. 658, 685 (1978); see also *Gomez* v. *Toledo,* ..... U.S. ....., 48 L.W. 4600, 4601 (1980) of the Civil Rights Act, and the consequent mandate that the Act "is to be construed generously" *Id.,* only unequivocal indication from Congress, absent here, that state tax matters are unprotected by the Act could suffice to sustain petitioners' present argument. As this court has said:

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[7] Petitioners' argument actually runs counter to the purpose of the Civil Rights Act and its jurisdictional provision. Justice Stone long ago traced the legislative history evidencing the intent of Congress to permit civil rights suits in the federal courts without regard to the amount in controversy. *Hague* v. *Committee for Industrial Organization,* 307 U.S. 496, 527-530 (1939) and this Court has confirmed the soundness of that view. *Douglas* v. *Jeannette,* 319 U.S. 157, 161 (1943); *cf. Jones* v. *Mayer Co.,* 392 U.S. 409, 412 n. 1 (1968).

" '[W]e are not at liberty to seek ingenious analytical instruments' to avoid giving a congressional enactment the scope that its language and origins require." *Lynch*, 405 U.S. at 549, n.16.

II.

The Complaint Pleads A Fourteenth Amendment Violation

Petitioners plainly err in arguing that taxpayer has not adequately pleaded a Fourteenth Amendment violation, Br. 23-28.[8] The complaint alleges that petitioner-Assessor imposed taxes for 1977 on the taxpayer which were three and one-half times the taxes levied against property of the same class generally throughout the County, A6; that the Assessor had knowledge of the discriminatory 1977 tax visited upon taxpayer, A7; that as a matter of official policy or governmental custom, he knowingly maintained, adopted, or promulgated policy statements, regulations, decisions and systems of assessment which produced egregious disparities such as that complained of, A7; that these disparities are far greater in size and number in county areas, such as taxpayer's all-Negro, economically deprived community, inhabited by minorities and poorer people as evidenced by official ratio studies (attached to the Complaint) known to Petitioner Assessor, A 5, 7-8; that similar discrimination was practiced against taxpayer in each of the preceding three years resulting in orders of refund (without interest) by the state courts, A 7-8; and that this discrimination was carried out under color of

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[8] Petitioners present their arguments regarding §1343(3) and the complaint's alleged failure to state a cause of action in a single section of their brief. See Br. Point I. For clarity, taxpayer has separated these arguments, answering the former in Point I and the latter in Point II of this brief.

law and in violation of taxpayer's federal constitutional rights. A 3-9. Beyond question such gross, knowingly imposed disparities and such an official system known to produce these disparities offend the Fourteenth Amendment and when practiced under color of law as alleged here state a claim under §1983. *Raymond* v. *Chgo. Un. Traction Co.*, 207 U.S. 20 (1907); *Sunday Lake Iron Co.* v. *Wakefield*, 247 U.S. 350 (1918); *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931); *Sioux City Bridge Co.* v. *Dakota County*, 260 U.S. 441 (1923); *Cumberland Coal Co.* v. *Board of Revision*, 284 U.S. 23 (1931); *Fulton Market Cold Storage Co.* v. *Cullerton, supra; North American Cold Storage Co.* v. *County of Cook, supra; Weissinger* v. *Boswell, supra; Cf. Garrett* v. *Bamford*, 538 F.2d 63 (3rd Cir.), *cert. denied*, 429 U.S. 977 (1976); *In re Chicago Rys. Co.*, 175 F.2d 282 (7th Cir.), *cert. denied sub. nom. People* v. *Sullivan*, 338 U.S. 850 (1949); *Louisville & Nashville Co.* v. *Public Service Commission*, 249 F. Supp. 894 (M.D. Tenn. 1966), *aff'd*, 389 F.2d 247 (6th Cir. 1968); *People ex rel. Toman* v. *Chgo. Union Station Co.*, 383 Ill. 153, 163 (1943).

Petitioners insist, however, that taxpayer's complaint is insufficient under the rule in *Snowden* v. *Hughes*, 321 U.S. 1 (1944), Br. 23-5. In that case a candidate for public office brought a civil rights damage action against members of a state primary canvassing board for their allegedly wrongful failure to issue him the certificate of nomination to which a successful candidate was entitled. This Court struck the complaint for want of federal jurisdiction because there was nothing in the complaint tending to show that in exercising its lawful duty to distinguish between successful and unsuccessful candidates the Board had acted with an invidious and purposely discriminatory purpose. This result followed from the settled principle that mere violation of a "statute is not without more a

denial of the equal protection of the laws", *Id.* at 8. Here taxpayer alleges not merely the fact of a triple overassessment violative of state uniformity requirements. The complaint also alleges that this discrimination was known to the Assessor, that it was produced under an official assessment system known by him to result in egregious disparities, that he refused to correct the overassessment when requested by taxpayer to do so, and that the assessment in issue followed similar overassessments for three preceding years which were held to be illegal by the state courts.[9] This is the very type of "purposeful discrimination" stemming from "a systematic overvaluation" which *Snowden* assayed would be actionable under §1983, 321 U.S. at 9-10, and which recently has been held actionable by the Seventh Circuit. *Fulton Market Cold Storage Co.* v. *Cullerton, supra.*[10]

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[9] Contrary to petitioners' implication, see Br. 28, *McGovern* v. *New York,* 229 U.S. 363 (1913), this case is not alleged to involve mere mistake or error. Likewise petitioners are incorrect in implying that *Fulton Market Cold Storage Co.* v. *Cullerton, supra,* failed seriously to consider whether the allegations there stated a cause of action under §1983, Br. 28. See 582 F.2d at 1079-81; see also *Fulton Market Cold Storage Co.* v. *Cullerton,* No. 74 C 5, Mem. Op. & Order dated Nov. 16, 1979, p. 3; *North American Cold Storage Co.* v. *County of Cook, supra,* 468 F. Supp. at 426.

[10] It apparently is petitioners' theory that a taxing procedure which systematically produces, and is known systematically to produce, great inequities not through mistake but through deliberate design is constitutionally tolerable even when knowingly applied to a taxpayer year after year in the face of state court determinations that such assessments of the taxpayer's property are illegal. That view, however, would effectively repeal the Fourteenth Amendment in tax cases.

The distinctions suggested by petitioners between this case and the tax cases cited in *Snowden, see* 321 U.S. at 9-10, Br. 26-7, are spurious. There is no practical difference between a system which deliberately assesses railroad, coal or bridge companies on a discriminatory basis in violation of uniformity requirements and a system which with like deliberateness discriminates against taxpayers such as the one at bar. In each of these instances the discrimination arises not necessarily from the fact of the disparate assessments alone but from the purposeful involvement of the defendants either in the particular case in litigation or in the system known to produce the inequalities. Plainly such involvement is well pleaded here."[11]

Petitioners' attempt to distinguish more current cases also lacks merit, Br. 27-8. *Garrett* v. *Bamford, supra,* and *Weissinger* v. *Boswell, supra,* both involved widespread lack of uniformity, the former purportedly because of a suspect racial classification and the latter because of the taxing officials' refusal "to perform their duties in accordance with state law." 330 F. Supp. at 622. While there may be racial overtones in the present case, see e.g., A 4, 7-8, they are not necessary to state a cause of action here because as in *Weissinger* the challenged system

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[11] In this term this Court affirmed the liberal construction to be given §1983 complaints at the pleading stage saying that "two-and only two-allegations are required in order to state a cause of action", *Gomez* v. *Toledo, supra,* 48 L. W. at 4601, namely that the defendant has deprived the plaintiff of a federal right and that this was done when defendant acted under color of law. This taxpayer has done that. What petitioners are really asking is that taxpayer "set out *in detail*" the facts she will prove at trial. Notice pleading under the modern rules does not require this. *Conley* v. *Gibson,* 355 U.S. 41, 47-8 (1957).

is said to be the consequence of a conscious, longstanding, county-wide system known to procure the constitutional deprivation. Br. 7.

III.

The Illinois No-Interest Refund is Not Plain, Speedy and Efficient

Petitioners erroneously contend that Illinois' no-interest refund remedy is plain, speedy and efficient as the terms are used in the Tax Injunction Act, 28 U.S.C. §1341.[12] Br. 37-49.[13]

a. Illinois' only remedy—one at law—does not allow interest on refunds

Neither injunctive, *Chicago Sheraton Corp.* v. *Zaban,* 71 Ill. 2d 85, 92-93 (1978); *North Pier Terminal Co.* v. *Tully,* 62 Ill. 2d 540, 545-546 (1976); *LaSalle National Bank* v. *County of Cook,* 57 Ill. 2d 318, 323-324 (1974), other equitable, nor declaratory relief, *Good Year Tire and Rubber Co.* v. *Tierney,* 411 Ill. 421 (1952) is available to taxpayer for unconstitutional tax discrimination in the

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[12] "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

[13] In this brief taxpayer has followed the order of analysis made by the court below rather than that of petitioners. This section therefore answers Point III of petitioners' brief and the following section answers Point II of petitioners' brief.

courts of Illinois under circumstances of this case. There is in practice a single statutory remedy.[14] Under it a

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[14] Other Illinois remedies mentioned by petitioners, Br. 9-10, n. 37-8, are of no aid to the present taxpayer.

While taxpayer may also challenge her assessment in an administrative proceeding by presenting a complaint before the county board of appeals, 120 Ill. Rev. Stat. §§593-606 (1977), that avenue of relief has proved completely ineffectual. Taxpayer has filed such complaints every year since 1974 without success A 6. Even when the circuit court has found that assessments for earlier years are constructively fraudulent, *In the matter of the application of the County Treasurer and ex-officio County Collector of Cook County, Illinois, for judgment, etc.* for the years 1974, (Misc. 75-36, No. 713), 1975 (Misc. 76-30, No. 465) and 1976 (Misc. 77-34, No. 587), the assesor has refused to modify taxpayer's assessment in the following year, instead uniformly recommending "no change" when consulted by the board of appeals A 6.

Likewise ineffectual is Section 194a of the Revenue Act, 120 Ill. Rev. Stat. §675a (1977), which provides that the Illinois courts must hold a settlement conference within 90 days after a taxpayer files an objection and if no settlement is reached thereafter set the objection for hearing within 90 days of a demand for hearing. First, taxpayer's allegation that there is a customary delay of 2 years in receiving funds upon the successful prosecution of a tax objection suit, A 8, is procedurally admitted in this court, *Jenkins* v. *McKeithen,* 395 U.S. 411, 421 (1969); *Warth* v. *Seldin,* 422 U.S. 490, 501 (1975); *Miree* v. *DeKalb County,* 433 U.S. 25, 27 (1977). Second, contrary to petitioners' suggestion, Br. 37, the Collector's application for judgment is usually not made till late November or early December, nine months after payment of the first installment and four to five months after the final installment of the tax bill is due in Cook County. Even under petitioners' reasoning, if the additional tandem 90-day periods referred to in Section 194a are added to this, it is apparent that at a minimum almost a year will lapse between payment of the final installment and hearing on a protesting taxpayer's objection and well over a year after payment of the first installment. (In aggravated cases where as here the illegal

(footnote continued)

taxpayer must pay the challenged tax in full under protest and sue in the circuit court of the county for refund.[15] See 120 Ill. Rev. Stat. §§675 and 716 (1977); *Clarendon Associates* v. *Korzen,* 56 Ill. 2d 101 (1974). To avail herself of this, the present taxpayer would have had to pay the entire 1977 tax bill of $6,106, including the $4,331 illegal portion, and thereafter institute refund litigation with its attendant costs and attorney fees not recoverable in the statutory proceedings.

There are, however, two notable limitations on this refund method. First, it is customarily accompanied by considerable delay—upwards of two years. Second, no interest is allowed on refunds.[16] *Clarendon Associates* v.

(footnote continued)
assessment is more than triple that permitted by law A 6, the resulting tax will be so excessive that a substantial portion of the excess will be included in the first (March 1st) installment of the tax bill. Perforce, this adds another five months delay (and loss of interest) with respect to refund of the illegal part of the March payment). Third, petitioners fail to note that when the Assessor's discrimination continues year after year A 7-8, requiring the taxpayer to pay in full the challenged tax each year, the delays in the refund procedure often mean that protest payments made with respect to two and three consecutive tax years can be tied up at once, greatly increasing the amount of funds whose use is lost to taxpayer at any one time.

[15] In all Illinois counties except Cook a taxpayer has the option of challenging an assessment judicially prior to payment of the tax. 120 Ill. Rev. Stat. §592.1-5 (1977). This suspect classification is not in issue here.

[16] Illinois courts deny interest on refunds of excessive taxes not only for the period between payment under protest and entry of an order of refund—so-called "pre-judgment" interest, Br. 5—but also for the period between entry of judgment and satisfaction thereof. *Neubert* v. *Foxworthy,* 71 Ill. App. 3d 438 (4th Dist. 1979). Counsel's continued use of the term "pre-judgment" interest masques this.

Korzen, supra; Lakefront Realty Corp. v. *Lorenz,* 19 Ill. 2d 415 (1960). In the latter case the taxpayer had alleged

> "on the basis of language found in *Hopkins* v. *Southern California Telephone Co.,* 275 U.S. 393, 72 L. Ed. 329, that the statutory remedy is inadequate because it does not provide for the recovery of interest on tax refunds." 19 Ill. 2d at 422.

The Illinois Supreme Court held:

> "We are of the opinion the latter view [that interest cannot be allowed upon taxes that were illegally collected in the absence of a statute expressly providing for interest] . . . is the only view compatible with the statutory system which provides for the appropriation, levy, collection and disbursement of taxes in this State, and we think too, as other courts have pointed out . . . that the silence of our refund statute on the question of interest discloses a legislative intention to deny it. Accordingly, we conclude that plaintiff is *not entitled* to interest in the absence of a statute imposing that liability. This being so, *the failure of the statutory remedy to provide for the recovery of interest is no measure of its adequacy.*" 19 Ill. 2d at 423.

Clarendon reiterates this rule:

> "This court has held in *Lakefront Realty Corp.* v. *Lorenz* . . . that under the statutory remedy provided by sections 194 and 235 of the Revenue Act of 1939 . . . the taxpayer is not entitled to interest on the refund. This court also held in *Lakefront* that this fact does not render the remedy at law inadequate so as to justify equity in assuming jurisdiction. We see no reason to depart from that decision." 56 Ill. 2d at 109.

The question thus becomes whether this failure of the Illinois courts to allow interest in connection with the

only available remedy renders the remedy not "plain, speedy and efficient within the meaning of §1341."[17]

b. The federal definition of adequacy controls

It is for this court alone to establish the definitive interpretation of an act of Congress, *Chesapeake & Ohio Ry. Co.* v. *Martin,* 283 U.S. 209 (1931), and in doing so, it is the general rule that, absent a contrary Congressional indication, such interpretation is to have nationwide uniformity and not turn on state law. *NLRB* v. *Natural Gas Utility District,* 402 U.S. 600, 603-4 (1971); *Jerome* v. *U. S.,* 318 U.S. 101, 104 (1942). The question of whether a non-interest remedy is a plain, speedy and efficient remedy within the meaning of §1341 therefore is a federal question for this court to determine on the basis of federal notions of equity jurisprudence and is not controlled by the decision of the Illinois Supreme Court in *Lakefront* or the decisions of any other state court.

That Congress intended this approach to §1341 is certain. For one thing, letting state law determine adequacy under §1341 would effectively bar *all* federal jurisdiction in state

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[17] *Boise Artesian Hot & Cold Water Co., Ltd.* v. *Boise City,* 213 U.S. 276, 282 (1909), relied on by petitioners, Br. 39-40, suggests that a taxpayer is left to his remedy at law "when that remedy is *as* complete, practicable, and efficient as the remedy in equity." It follows that where, as here, the legal remedy is facially inadequate and not merely inadequate by comparison to the equitable remedy, equity may take jurisdiction.

Notably, taxpayer does not claim that the mere illegality of petitioners' acts necessarily warrants equitable jurisdiction. See Br. 49: *Shelton* v. *Platt,* 139 U.S. 591 (1891); *Union Pacific Ry. Co.* v. *Ryan,* 113 U.S. 516 (1885). Rather, for reasons given in this brief, taxpayer claims that the Illinois remedy at law for this illegality is not plain, speedy and efficient.

revenue cases because a state court would never concede that its remedies are less than adequate no matter how "cumbersome and ponderous" as the Illinois Court has characterized the remedy at bar, *People ex rel. Kohorst* v. *G.M. & O.R.R.*, 22 Ill. 2d 104, 109 (1961), oppressive, see, e.g., *Chicago Sheraton Corp.* v. *Zaban, supra,* or inequitable. *Lakefront Realty Corp.* v. *Lorenz, supra.* Yet, §1341's legislative history clearly indicates federal jurisdiction is *not* to be barred "*except* where there is a plain, speedy and efficient remedy" in the state courts, S. Rep. No. 1035, 75th Cong., 1st Sess. 2 (1937); 604 F.2d at 532; Pet. 4a, as this Court and others have recognized repeatedly. See, e.g., *Hillsborough* v. *Cromwell,* 326 U.S. 620 (1946); *Spector Motor Service, Inc.* v. *O'Connor,* 340 U.S. 602 (1951); *Georgia Railroad & Banking Co.* v. *Redwine,* 342 U.S. 299 (1952); *Garrett* v. *Bamford, supra.*

That Congress did not intend that state law govern the definition of adequacy under §1341 is evident for an added reason in §1983 cases. In such case it would be anomalous that federal law would control, as it certainly does, in the determination of whether a no-interest remedy is adequate so as to bar equitable relief under the Civil Rights Act, *Martinez* v. *California,* 48 L.W. 4077 (Jan. 15, 1980); *cf Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 229, 238 (1969) if federal law were not also to control in determining whether the bar of §1341 applies to a federal court §1983 tax case. Petitioners appear to agree. Br. 31. It would be equally anomalous to ascribe to Congress an intention of permitting the several states to manipulate federal jurisdiction in opposite directions merely by the characterization with respect to adequacy they placed on a no-interest remedy under the circumstances at bar.

c. Federal courts view no-interest remedies as inadequate

1. Section 1341 cases

While it is true that this Court has not expressly decided whether the failure "to provide interest on a successful refund application renders the state remedy . . . an inadequate one within the meaning of §1341", *Department of Employment* v. *U. S.*, 385 U.S. 355, 358 (1966), the leading Section 1341 cases which have considered this question have concluded that a no-interest remedy is not adequate. In *U. S. and E. I. du Pont de Nemours & Co.* v. *Livingston*, 179 F. Supp. 9, 15 (E.D. S.C. 1959) (three judge court), *aff'd per curiam*, 364 U.S. 281 (1960) Circuit Judge Haynsworth found that "the restrictions of 28 U.S.C.A. §1341 should be held inapplicable" on the grounds that it was uncertain whether South Carolina courts would allow interest on the refunds under the tax statute there involved. He said:

> "It is well settled that a *right to recover taxes illegally collected is not an adequate remedy if it does not include the right to recover interest at a reasonable rate for the period during which the taxpayer's money is withheld.* Even if existence of the right be merely cast in substantial doubt, the remedy is not plain or adequate. The official position of the Tax Commission at the time of filing of this action and the decision of the Supreme Court of South Carolina in *Colonial Life* requires us to conclude there is presently grave doubt of the existence of a right to recover interest in such cases and that the legal remedy afforded taxpayers in South Carolina is not plain or adequate.
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> In the face of such official denials, a taxpayer should not be required to run the risk that the official position might be sustained."
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> * * *
>
> "South Carolina may allow interest upon refunds of taxes or not as she chooses. If she does not make

> clear the existence of the right to recover such interest, however, she necessarily opens the door to equitable relief to taxpayers and forecloses a remission of the parties to the legal remedy provided by her statutes." *Id.*

Later, a three judge court in the Seventh Circuit reached the same conclusion after determining that a taxpayer challenging an assessment under the Illinois Retailers' Occupation Tax Act was required to file a bond in the amount of the unpaid tax and penalty but, even if successful, could not recover the cost of the bond.

> "A failure to provide interest on a tax refund has been considered by the courts as evidence that a taxpayer does not have a plain, speedy and efficient remedy. *United States* v. *Livingston.* . . . It is the court's view that failure to provide for cost of the required bond is analogous to a failure to provide for recovery of interest on a tax refund." *U. S. and Olin Mathieson Chemical Corp.* v. *Department of Revenue,* 191 F. Supp. 723, 726-727 (N.D. Ill.) (three judge court), *rev'd on other grounds,* 368 U.S. (1961).

Accordingly Section 1341 was held to provide no bar to issuance of federal declaratory and injunctive relief with respect to construction and application of the Illinois sales tax statute.

More recently in *Fulton Market Cold Storage* v. *Cullerton, supra,* a court of appeals, holding that a §1983 action for damages will lie for discrimination of the kind alleged at bar notwithstanding the Tax Injunction Act, observed:

> "Even if §1983 were a supplementary remedy . . . the unavailability in the Illinois courts of certain elements of plaintiff's damage, i.e., interest and at-

torney's fee, *would make the federal remedy necessary* to afford complete relief." 582 F.2d at 1080.[18]

2. Pre-Section 1341 federal equity cases

Section 1341 codified and "gave explicit sanction to the pre-existing equity practice" *Moe* v. *Salish & Kootenai Tribes,* 425 U.S. 463, 470 (1970); see also *Great Lakes Dredge & Dock Co.* v. *Huffman,* 319 U.S. 293, 298-99 (1943) 604 F.2d at 533; Pet. 5a n. 4; Br. 40. Hence, the fact that federal courts exercising equitable jurisdiction before 1937 viewed a no-interest remedy as inadequate provides important added support for the construction placed on §1341 by more recent decisions.[19] 604 F.2d at 533; Pet. 5a n. 4; Comment, *Relief in State Tax Cases,* 93 Harv. L.R. 1016, 1022-23 (1980).

Judge Learned Hand's analysis of more than a half century ago exemplifies pre-1341 thought:

> "[I]t seems to me plain that *it is not an adequate remedy, after taking away a man's money as a condition of allowing him to contest his tax, merely to hand it back, when, no matter how long after, he estab-*

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[18] Authorities offered by petitioners either do not consider the no-interest question, *Stratton* v. *St. Louis Southwestern Ry. Co.,* 284 U.S. 530 (1932) Br. 44; concern circumstances in which the injunctive relief sought here was available in the state courts, *Bland* v. *McHann,* 463 F.2d 21, 28-29 (5th Cir. 1972), *cert. denied,* 410 U.S. 966 (1973) Br. 44; or involve a request for interest in a refund action *at law, U.S.* v. *Board of Commissioners of Camanche County,* 6 F. Supp. 401 (W.D. Okla. 1934); *Bertelsen and Peterson Engineering Co.* v. *U.S.,* 60 F.2d 745 (1st Cir. 1932). Br. 42-3. None of the latter cases had occasion to consider whether the no-interest remedy at law warranted exercise of equity jurisdiction.

[19] *Livingston,* on which *Olin-Mathieson* relies, viewed many of these pre-1937 cases as controlling authority.

> *lishes that he ought never to have been required to pay at all.* Whatever may have been our archaic notions about interest, in modern financial communities a dollar to-day is worth more than a dollar next year, and to ignore the interval as immaterial is to contradict well-settled beliefs about value. The present use of my money is itself a thing of value, and, if I get no compensation for its loss, my remedy does not altogether right my wrong." *Procter & Gamble Distributing Co.* v. *Sherman,* 2 F.2d 165, 166 (S.D. N.Y. 1924).

The same thought was expressed by a three judge court five years before enactment of §1341.

> "[T]here is another reason why the remedy provided by sections 511 and 512 of the Code of 1911 is inadequate. Those sections provide merely for the recovery of the amount of the tax, and no interest. Whatever may be said as to those views which were entertained in remote times respecting interest, considering such exactions in all cases usurious or illegal, if not positively sinful, yet in modern times such archaic notions have long since been abandoned. Money is now a proper subject of hire, and the habits and customs of the people and modern law all concur in recognizing that interest is a proper means of compensation for the use of money lent or wrongfully detained. *A remedy which does not provide for a reasonable amount of interest is not a complete or adequate remedy."* *Nutt* v. *Ellerbe,* 56 F.2d 1058, 1062 (E.D. S.C. 1932).

This Court intimated like thinking prior to 1937. In *Hopkins* v. *Southern California Telephone Co.,* 275 U.S. 393, 399-400 (1928) in rejecting a challenge to an equity proceeding in the district court, it was noted that in "no

permitted proceeding at law could interest upon payments [of taxes under protest] be recovered for the time necessary to obtain judgments." Several years later Justice Stone expressly recognized the soundness of Judge Hand's remarks in *Sherman,* saying

> "The legal remedy provided by the statute for the recovery of taxes after payment *falls short of adequacy* in at least two respects, *Refund,* if any, *is expressly without interest. . . .*" *Educational Films Corp.* v. *Ward,* 282 U.S. 379, 386 n. 2 (1931).

d. 1341's legislative history also contemplates the exercise of federal equity jurisdiction in no-interest cases

The House and Senate Judiciary Committee Reports, as well as the record of the floor proceedings, make clear that §1341 is not to block access to federal equity when state relief is inadequate:

> "It should be emphasized that *the bill does not take away any equitable right* of the taxpayer or deprive him of his day in court. Specific provision is made that the *suit will not be withdrawn from the jurisdiction of the Federal district court except* where there is a plain, speedy and efficient remedy at law or in equity in the courts of the State. . . ." S. Rep. No. 1035, 75th Cong., 1st Sess. (1937) p. 2.

See also 604 F.2d at 532; Pet. 4a. Given the inadequacy of a no-interest remedy, it follows that federal jurisdiction is not barred by §1341 unless allowing federal jurisdiction would frustrate elimination of the evils at which the Tax Injunction Act was directed. Those evils were two in number, *Fulton Market Cold Storage* v. *Cullerton, supra,* 582 F.2d at 1074; see also *Garrett* v. *Bamford, supra,* 538 F.2d at 66-67; *Tramel* v. *Schrader,* 505 F.2d

1310, 1316 (5th Cir. 1975); *Hargrave* v. *McKinney,* 413 F.2d 320, 325-326 (5th Cir. 1969); 81 Cong. Rec. 1415-1417 (1937); S. Rep. No. 1035, 75th Cong., 1st Sess. (1937); H. R. Rep. No. 1503, 75th Cong., 1st Sess. (1937), neither of which would be promoted by federal jurisdiction in this case.

First was the unfairness visited on local citizens who, lacking the diversity of foreign corporations, did not have the latters' access to federal court injunctive relief which was unavailable in the state courts. That concern is not present here: taxpayer is a local resident, seeking relief under 28 U.S.C. §1343 and 42 U.S.C. §1983 which is available in the federal courts to all citizens without respect to their residency.

The second objective of §1341, a variant of the first, was to prevent foreign corporations from disrupting the state taxing process through federal injunctions when the local remedy for a challenged tax was perfectly adequate and diversity jurisdiction was therefore not needed to protect the out-of-stater from local discrimination. As Senator Bone said during the floor debate: "First adopted to bring about justice, it [diversity jurisdiction] has, as a matter of practice, very largely resulted in injustice and discrimination." 81 Cong. Rec. 1417 (1937). The concern focused not on the disruptive impact injunctions can have on local tax administration but rather on the unfairness and inappropriateness of that impact when foreign corporations cause it by invoking diversity jurisdiction to give them "an *advantage* over their adversaries." *Id.* This second consideration is not implicated here, again because of taxpayer's in-state status. To the contrary, the no-interest system at bar operates to the unfair advantage

of the taxpayer, a result for which no Congressional support exists.[20]

e. The failure of some state legislatures to allow interest under the statutory refund procedure does not make those procedures adequate

Petitioners seek to escape the thrust of the foregoing §1341 and federal equity cases and of the Tax Injunction Act's legislative history by contending that the failure of

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[20] Little or no disruption of any legitimate state interest will attend the issuance of a federal injunction in actions such as that at bar. Taxpayer seeks to enjoin payment only of the discriminatory portion of her tax bill. The flow of lawful revenue represented by the proper portion of the tax would continue uninterrupted. Moreover, demonstrating the inadequacy of a no-interest remedy would not open the federal court house doors. That would merely remove the bar of §1341. It would remain to establish, as taxpayer has here, an independent basis for jurisdiction under §1343. *Cf. 28 East Jackson Enterprises, Inc.* v. *Cullerton,* 551 F.2d 1093, 1096 (7th Cir.) *cert. denied,* 434 U.S. 835 (1977). If, as petitioners suggested in the court below, such a "state of affairs" will "seldom" arise, Pet. for Reh. 3, even minimal impact on state tax administration will not occur. If such a state of affairs proves to be more wide-spread, nothing in the policy considerations behind §1341 would bar federal access merely because of any increased strain which might result upon the discriminatory state system. When federal jurisdiction is properly invoked, federal courts have a "virtually unflagging obligation to exercise" it, *Colorado River Water Conservation District* v. *U. S.,* 424 U.S. 800, 817 (1976); see also *England* v. *Board of Medical Examiners,* 375 U.S. 411, 415 (1964). This is especially so in tax cases such as that at bar in which the state legislature could easily "choose", *U. S. and E. I du Pont de Nemours & Co.* v. *Livingston, supra,* to provide an adequate remedy but has deliberately elected not to do so. See, e.g., HB-1879 and SB-1061, 78th Gen. Ass. (1973 Session); HB-451 and HB-1317, 81st Gen. Ass. (1979 Session), interest-on-refund bills which have failed in the Illinois General Assembly. See 604 F.2d at 533; Pet. 6a n.5.

some[21] state courts to award interest in tax refund cases, Br. 40-6, establishes the adequacy of a no-interest remedy for purpose of §1341. Petitioners' analysis is faulty for several reasons.

First, the cited cases, Br. 40-1, are refund not injunction actions. Most determine only whether interest is allowable under the statutory procedure presented. This is merely a matter of statutory construction and does not establish whether those same state courts would deem a no-interest remedy at law to be adequate so as to bar injunctive jurisdiction. Certainly there would be nothing illogical or unusual for equity to conclude that a no-interest remedy at law is inadequate. On the contrary, that is the very type of determination chancellors must and do make every time they exercise their equitable jurisdiction. 1 J. Pomeroy, Equity Jurisprudence §217 (5th ed. 1941)

Second, the reasoning behind many of the no-interest constructions placed on the state statutory remedies presented in petitioners' cases does not apply here. That reasoning rests on a common law principle that interest is not allowed against the sovereign without its consent or agreement. Injunctive relief, however, does not entail the award of interest for when collection of the illegal portion of a tax is enjoined, no refund action is necessary. Nothing is asked of the sovereign. Moreover, since the present suit is directed against local officials, it would be well founded under longstanding precedents of this Court even if it sought interest:

> "It is quite true that the United States cannot be subjected to the payment of interest unless there be an authorized engagement to pay it or a statute permitting recovery. . . . *United States* v. *North Carolina,*

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[21] As petitioners concede, Br. 41, n. a number of states allow interest on tax refunds, even without statutory authorizations to do so, see 88 ALR 2d 823 (1963).

> 136 U.S. 211, 216 . . . But this exemption has never as yet been applied to subordinate governmental agencies. On the contrary, in suits against *collectors* to recover moneys illegally exacted as taxes and paid under protest, the settled rule is that interest is recoverable without any statute to that effect, and this although the judgment is not to be paid by the collector, but directly from the treasury." *National Home* v. *Parrish,* 229 U.S. 494, 496 (1913).[22]

See also *Erskine* v. *Van Arsdale,* 15 U.S. 75, 77 (1872); *cf. Billings* v. *U.S.,* 232 U.S. 261, 287-8 (1914). Even if the present action were thought to be directed at the sovereign, the concept of immunity embodied in the Eleventh Amendment has never in this court's view barred injunctive relief.[23] *Edelman* v. *Jordan,* 415 U.S. 651 (1974);

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[22] By making the rule in *U. S.* v. *North Carolina, supra,* inapplicable to subordinate governmental agencies, e.g., as here to a county and its tax officials, *Parrish* distinguishes many of petitioners' authorities, Br. 41-2, which rely on *U. S.* v. *North Carolina.* See, e.g., *Schlesinger* v. *State,* 195 Wis. 366, 218 N.W. 440, 441 (1928); *Cannon* v. *Maxwell,* 205 N.C. 420, 171 S.E. 624, 625 (1933); *Fajardo Sugar Co.* v. *Richardson, 7* Puerto Rico Fed. Rep. 154 (D. P.R. 1914); *Ford Motor Co.* v. *Baker,* 71 N.D. 298, 300 N.W. 435, 439 (1941).

[23] The protection afforded the sovereign under the Eleventh Amendment has been consistently construed not to extend to political subdivisions such as counties and municipalities. *Edelman* v. *Jordan,* 415 U.S. 651, 667, n. 9; *Mt. Healthy Board of Ed.* v. *Doyle,* 429 U.S. 274 (1977); *Lake Country Estates* v. *Tahoe Planning Agency,* 440 U.S. 391, 400-401 (1979). Moreover, it is now settled that units of local government are "persons" under §1983, *Monell* v. *Department of Social Services,* 436 U.S. 658 (1978) subject to liability flowing from their constitutional violations notwithstanding the good faith of their agents and officers, *Owen* v. *City of Independence,* 48 L.W. 4389 (April 16, 1980). The financial exposure to local governments under this construction of §1983 is markedly greater than any exposure thought to attend the decision below. See n. 20, *supra.*

Milliken v. *Bradley,* 433 U.S. 267, 289 (1977); *Hutto* v. *Finney,* 437 U.S. 678, 689-90 (1978). Finally, to the extent state rules disallowing interest in refund actions are nonetheless deemed pertinent in measuring the adequacy of the Illinois remedy under §1341, this court has considered and rejected those rules. *Billings* v. *U.S., supra,* involved a government claim for interest on overdue taxes.[24] This Court, considering the question of whether interest can be allowed absent statute or agreement, found the state court rule "absolutely in conflict" with the federal rule:

> "The conflict between the systems is pronounced and fundamental. In the one, the state rule, except as to contract, no interest without statute; in the United States rule, interest in all cases where equitably due unless forbidden by statute. *Id.* at 287-88.

These precedents plainly state the federal law applicable to the present case and are therefore "controlling if they be not now overruled" *Id.*

There is another aspect of several of petitioners' cases which undermines their persuasiveness on the proposition they urge here. When the taxing statute involved is wholly void or unconstitutional or the challenged tax has been imposed on exempt property those cases either permit interest without statutory authorization on the grounds of the

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[24] *Billings* gives no indication that its analysis was to be restricted to interest awards where the government rather than the taxpayer is the claimant. On the contrary, *Billings'* reliance on leading cases in which taxpayers were claimants, e.g., *National Home* v. *Parrish, supra; Erskine* v. *Van Arsdale, supra,* demonstrates that the court was merely applying to a government claim general principles long settled in taxpayer refund cases.

> "unthinkability of taking a taxpayer's property unconstitutionally and not reimbursing him by the payment of interest for the period during which he was deprived." *Brodsky* v. *Murphy,* 25 N.Y. 2d 518, 255 N.E. 2d 700, 701 (1969),

see also *Boott Cotton Mills* v. *City of Lowell,* 159 Mass. 383, 34 N.E. 367 (1893), or deem the remedy at law to be inadequate so as to warrant the exercise of equity. *Lakefront Realty Corp.* v. *Lorenz, supra,* 19 Ill. 2d at 417.[25] It is, however, difficult to see why these results should not apply with equal force to a case such as that at bar which challenges taxes on the grounds that they violate the guarantees of the Fourteenth Amendment of the federal constitution. Such abridgment involves precisely the "higher degree of intrusion upon the rights of the taxpayer", *Brodsky* v. *Murphy, supra,* 255 N.E. 2d at 702, which the New York Court of Appeals affirmed will warrant the payment of interest even without a statute requiring it.

Finally, and perhaps most importantly, contra. Br. 46, a rule deeming a no-interest refund remedy adequate so as to bar equity is manifestly unacceptable because it shocks the conscience. If Learned Hand could say a half century ago: "[I]n modern financial communities a dollar to-day is worth more than a dollar next year," *Procter & Gamble Distributing Co.* v. *Sherman, supra,* how much more is this true in times of double digit inflation and a twenty percent prime rate. Judge Hand's views on interest accord with those expressed by this court from the earliest times.

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[25] The continued vitality of the Illinois rule allowing injunctive relief against the imposition of taxes on exempt property is somewhat unclear. See *Christian Action Ministry* v. *Dept. of Local Government,* 74 Ill. 2d 51, 57-60 (1978), *overruling, American College of Surgeons* v. *Korzen,* 36 Ill. 2d 340 (1967).

> "It is a dictate of natural justice, and the law of every civilized country, that a man is *bound in equity,* not only to perform his engagements, but also to repair all the damages that accrue naturally from their breach . . . Everyone who contracts to pay money on a certain day knows, that, if he fails to fulfill his contract, he must pay the established rate of interest for his non-performance." *Curtis* v. *Innerarity,* 47 U.S. 146, 154 (1848)

See also *Spalding* v. *Mason,* 161 U.S. 375, 395-396 (1896).

> "[I]nterest is not recovered according to a rigid theory of compensation for money withheld, but is given in response to *considerations of fairness." Jackson County* v. *U.S.,* 308 U.S. 343, 352 (1939).

"Both in law and in equity, interest is allowed on money due . . . in order to arrive at *fair compensation." Miller* v. *Robertson,* 266 U.S. 243, 258 (1924); see generally 36 ALR 2d 337 *et seq.* (1954). Under these settled principles, it is patent that the no-interest character of Illinois' only remedy at law substantially offends elemental considerations of fairness and provides a natural basis for equitable jurisdiction because of its inadequacy. This failure of the Illinois courts to do equity has already resulted in a loss to taxpayer of some $2,000[26] and led the court below to state the obvious:

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[26] In 1974, 1975 and 1976 respectively, the county exacted illegal excessive taxes from taxpayer in the approximate amounts of $4,600, $3,650 and $3,950 and held these sums before refund was ordered by the circuit court for periods of 3, 2 and 1 years respectively. Even at average prime for that period (which as a practical matter was not available to this taxpayer), taxpayer lost, and the county gained some $2,000 on the use of the illegally exacted money—an amount which about equalled the total just tax in any of the year in question. A 8-9.

> "The Illinois tax grievance remedy, which forbids the recovery of interest and allegedly involves a two-year delay prior to refund payment, gives a *financial incentive* to one of the parties (the County) *to delay* dispute resolution and imposes severe financial hardships on private parties seeking to redress their grievances." 604 F.2d at 536; Pet. 11a[27]

IV.

An Illinois State Court Remedy for Injunctive Relief Under §1983, Even if *Arguendo* Available. Would Not Constitute a Plain, Speedy and Efficient Remedy Under §1341

Petitioners argue that even if a no-interest remedy is inadequate, taxpayer has a plain, speedy and efficient remedy in the Illinois courts because she can bring the instant complaint there under §1983. Br. 29, *et seq.* The argument is unsound for several reasons.

First, the cases cited by petitioner as authority for the proposition that the availability of a §1983 action in state

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[27] Petitioners suggest a §1983 damage action, in which according to petitioners there would be no recoupment of lost interest, Br. 39-49, will put "less pressure on the system" than injunctive relief. Br. 33. This misses the point. Adequacy of the state court remedy, not pressure on the system, controls the application of §1341. Where, as here, that remedy is shown to be not plain, speedy and efficient, taxing officials whose own discrimination has created a potential for pressure cannot be heard to say equity should stay its hand. It is also noteworthy that at stake here is the vindication of constitutional rights abridgment of which has, for this taxpayer, required remedial action in each of six consecutive years. Multiplicity of suits constitutes an additional dimension of inadequacy. See Comment, *Relief in State Tax Cases,* 93 Harv. L. R. 1016, 1020 n. 21 (1980).

courts constitutes a plain, speedy and efficient state court remedy under § 1341 are inapposite. Br. 30. "None of these cases justifies its holding with any detailed analysis of the relationship between" §§1341 and 1983. 604 F.2d at 537, n.10, Pet. 13a. Moreover, in each of these cases—*Horn* v. *O'Cheskey,* 378 F. Supp. 1280, 1286 (D.N. Mex. 1974); *Green* v. *Klinkofe,* 422 F. Supp. 1021, 1027 (N.D. Ind. 1976); *Advertiser Co.* v. *Wallace,* 446 F. Supp. 677, 680 (M.D. Ala. 1978)—there was available state court injunctive and/or declaratory relief—the very form of relief sought by the present taxpayer but indisputably *unavailable* to taxpayer in the courts of Illinois. See *Chicago Sheraton Corp.* v. *Zaban,* 71 Ill. 2d 85, 92-3 (1978); *Goodyear Tire and Rubber Co.* v. *Tierney,* 411 Ill. 421 (1952).

Second, while it may be true that state courts *may* entertain §1983 actions, *Martinez* v. *California,* ..... U.S. ....., 48 L.W. 4076, 4077, n. 7; *Maine* v. *Thiboutat, supra,* 48 L.W. at 4860, n. 1, this court has reserved the question whether they *must. Id. Testa* v. *Katt,* 330 U.S. 386, 394 (1947) held that a state is not free to refuse enforcement of a federal claim "where the same type of claim, if arising under state law, would be enforced in the state courts." *Martinez* v. *California, supra.* That, however, is not the situation presented here for it is certain that the Illinois courts, if presented with the instant taxpayer's claim for injunctive relief on the grounds that the uniformity provisions of the state constitution have been violated, would *not* give relief. *Lakefront Realty Corp.* v. *Lorenz,* 19 Ill. 2d 415 (1960); *Clarendon Assoc.* v. *Korzen,* 56 Ill. 2d 95, 109 (1973). Therefore, there exists the substantial question not only whether an Illinois court must accept jurisdiction over a §1983 action seeking to enjoin a state tax but also whether it would. Such uncertainty relieves taxpayer of trying her

luck under §1983 in the courts of Illinois. *Hillsborough* v. *Cromwell,* 326 U.S. 620, 626 (1946).[28]

Third, even assuming the courts of Illinois would entertain a §1983 injunction suit touching a state revenue matter, considerable doubt exists as to whether they would apply federal equity law as announced by the court below (i.e., holding that a no-interest remedy is inadequate) or whether, instead, they would follow the contrary rule under *Lakefront.* And while *Martinez* v. *California, supra,* makes clear that in state court §1983 actions certain state defenses cannot be allowed to the extent they would immunize §1983 defendants from the consequences of their unconstitutional practices, it is far from clear that the Illinois courts would feel bound by the "federal" equity principle articulated by the Seventh Circuit in this case. 604 F.2d at 537-8 n.12; Pet. 14a, n.12; Comment, *Racial Discrimination and the Tax Injunction Act,* 90 Harv. L. R. 616, 623-4, n. 49 (1977).

In *People ex rel. Korzen* v. *Fulton Market Cold Storage Company,* 22 Ill. App. 2d 3rd 1088 (1st Dist. 1974) *rev'd,* 62 Ill. 2d 443, *cert. denied,* 429 U.S. 833 (1976), a taxpayer sought a refund from the Illinois courts in the statutory proceeding alleging, *inter alia,* a count under Section 1983. The taxpayer raised the §1983 claim in the trial court and argued it in both the Illinois Appellate and Supreme Courts, contending that because a federal cause of action

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[28] Three weeks ago petitioner Tully, represented by counsel of record here, asserted in a tax injunction matter pending before the Illinois Appellate Court:

> "42 U.S.C. 1983 does not apply to tax cases." *The 400 Condominium Ass'n.* v. *Tully,* No. 78-873 (1st Dist.) Objections to Plaintiffs-Appellants' Motion for Reconsideration, p. 1.

Petitioner Tully's contrary argument here, Br. 29-36 completely vitiates Point II of his present brief. He cannot now contend that the availability to this taxpayer of §1983 relief in the courts of Illinois is anything but extremely uncertain so as to lift the bar of §1341.

under §1983 was involved, the federal doctrine, that in a civil rights action the state remedy "need not be first sought and refused before the federal one is invoked", controlled. *Monroe* v. *Pape,* 365 U.S. 167, 183 (1961); 22 Ill. App. 3d at 1089; see *Carter* v. *Stanton,* 405 U.S. 669 (1972); *Damico* v. *California,* 389 U.S. 416 (1967); *McNeese* v. *Board of Education,* 373 U.S. 668 (1963). The Illinois Supreme Court, however, squarely held that the Illinois doctrine requiring exhaustion governed and dismissed taxpayer's complaint.[29] 62 Ill. 2d at 446-447. There is no reason to believe the Illinois courts would take a different approach here and put aside the state rule that a no-interest remedy is adequate and adopt the contrary federal rule.

At the very least substantial uncertainty exists as to what rule the Illinois courts would follow, and hence what relief they would afford in a §1983 case, as petitioners candidly recognize:

> "This is not to say that the decision of the state court as to whether federal equity law requires pre-judgment interest on tax refunds will necessarily accord with the opinion of the court below." Br. 31[30]

This uncertainty lifts the bar of 1341. *Hillsborough* v. *Cromwell, supra; Garrett* v. *Bamford, supra,* 538 F.2d at 70.

Fourth, even if it were certain what Illinois courts hearing taxpayer's §1983 claim would do regarding *Lakefront,* it would not follow that §1341 requires taxpayer to take

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[29] When a federal court was presented with *Fulton's* claim, it applied the federal rule on exhausting and sustained the taxpayer's complaint. *Fulton Market Cold Storage* v. *Cullerton, supra,* 582 F.2d at 1080.

[30] Petitioners declared below:

"The facts pleaded in the Complaint show that taxpayer is *not* entitled to equitable relief under Illinois law." Pet. for Reh. 3, n.

that claim to the state court. If *Lakefront* were thought to control, it would clearly indicate state court unwillingness to protect federal rights and the policy considerations behind §1983 would demand access to the federal courts. *Monroe* v. *Pape,* 365 U.S. 167, 173-180 (1961); *Mitchum* v. *Foster,* 407 U.S. 225, 240-2 (1972). The contrary assumption—that Illinois courts would be bound by the federal equity jurisprudence enunciated in the court below is even less helpful to petitioners because thus forcing state courts to ignore their own equity principles and follow those developed by the federal courts conflicts in the extreme with §1341's policy against federal intrusion into state tax matters. Given the antipathy of the Illinois courts to imposition of federal jurisprudence upon it as illustrated in *28 East Jackson Enterprises, Inc.* v. *Rosewell,* 65 Ill.2d 420 (1976), and a later suit, *28 East Jackson Enterprises, Inc.* v. *Rosewell,* 63 Ill.App.3d 880 (1st Dist. 1978) where the courts refused to take jurisdiction in a case involving *Pullman*[31] like abstention stating:

> "As this case has been shaped, the role of the Illinois judicial system closely resembles that of a master in chancery for the Federal district court", 65 Ill.2d at 425,

it is hard to imagine how the interests of comity could be more offended and state court freedom in tax matters more attenuated than by requiring state courts to follow federal equity rules. Such, however, would be the case if those courts were compelled to follow the decision below.

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[31] *Railroad Comm'n* v. *Pullman Co.,* 312 U.S. 496 (1941). The reasons underlying petitioners' reference to the *28 East Jackson* cases, Br. 18-19, are not evident unless it be to furnish another example of egregious overassessment in Cook County. Counsel have been informed that taxpayer has deposited with her attorneys what she holds to be the just amount of her 1977 taxes and has paid the just portion of her 1978 taxes to petitioner Collector. Final bills for 1979 taxes have not yet been issued.

Finally, if petitioners are correct that §1341 requires that taxpayer lodge her §1983 claim with the state court, then the court below is entirely correct in saying that "the Tax Injunction Act would bar federal jurisdiction in *all* cases involving state tax operations—without exception", 604 F.2d at 538; Pet. 15a, an anomalous result for which petitioners offer no authority. To be consistent, this would be true even in diversity (and presumably, in federal question) cases, contrary to petitioners' assertion, Br. 32, 3, since §1341 would still require pleading the federal civil rights claim in the state court in a §1983 action. "Although Congress possesses the power to legislate this result, there is no indication that the Tax Injunction Act was meant to do so." 604 F.2d at 538; Pet. 15a[32]

In sum, petitioners' argument that §1341 forces the present taxpayer to litigate her §1983 claim in state court lacks authority and offends the policies behind both statutes. What petitioners really seek by this tack is to protect the income they have been earning by investing for two years, A 8, the excess taxes taxpayers must post in order to pursue Illinois' only remedy at law. This, however, is nothing short of taking property without due process, and it was to relieve just such deprivations

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[32] Excusing only diversity plaintiffs from bringing their §1983 actions in state court, Br. 33, is equally anomalous. Abuse of diversity jurisdiction by out-of-state taxpayers was the very reason for §1341's enactment, *supra* 23-25, with the result that jurisdiction under 28 U.S.C. §1332 is the prime example of federal jurisdiction curtailed by the Tax Injunction Act. Moreover, there is no evidence in the legislative history of the Act that Congress intended to give the wealthy out-of-stater who could satisfy 28 U.S.C. §1332's jurisdictional amount preferred access to the federal courts in civil rights matters involving state revenue. Yet under petitioners' theory General Motors would not be required by §1341 to present its §1983 tax claims to the Illinois courts while an impoverished local taxpayer would.

stemming from inadequate state remedies that the Civil Rights Act was enacted.[33] *Monroe* v. *Pape, supra,* 365 U.S. at 173-4.

Considerations of comity and federalism as expressed in *Younger* v. *Harris,* 401 U.S. 37 (1971) and *Trainor* v. *Hernandez,* 431 U.S. 434 (1977) do not aid petitioners. Br. 34-6. These cases require the district court to refrain from exercising its jurisdiction over a suit[34]

> "challenging the constitutionality of a state law under the Federal Constitution and seeking to have state officers enjoined from enforcing it . . . when it appears that the State has already instituted proceedings in the state court to enforce the challenged statute against the federal plaintiff and the latter could tender and have his federal claims decided in the state court." *Trainor* v. *Hernandez, supra,* 431 U. S. at 440.

Exercise of federal jurisdiction under such circumstances is viewed to offend "basic concerns of federalism" through unseemly interference "with legitimate state functions, particularly with the operation of state courts." *Id.* at 441.

Younger abstention has no place where, as here, the federal constitutionality of a state law is not under attack,

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[33] Taxpayers whose monies are returned after long delays without interest in economic reality pay an added tax measured by the refund's use value (interest) which the county retains. That use value *pro tanto* reduces the amount of revenues otherwise required from the general populace such that the disfavored taxpayers subsidize the rest of the county. This added tax, imposed without legal warrant, plainly and invidiously discriminates against the disfavored taxpayers and results in a classic taking of property without due process. See Comment, *Federal Injunctive Relief in State Tax Cases,* 93 Harv. L. R. 1016, 1023 (1980).

[34] This Court has never held that "*Younger* principles apply to *all* civil litigation." *Trainor* v. *Hernandez, supra,* 431 U.S. at 496 n. 8 or to the present civil circumstances.

no unsettled questions of state law are involved,[35] *Id.* at 445, there is no prior pending state suit,[36] *Id.* at 444, and

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[35] The controlling question of state law in this case has been authoritatively settled by the Illinois Supreme Court in *Lakefront Realty Corp.* v. *Lorenz, supra,* and *Clarendon Association* v. *Korzen, supra;* Illinois denies interest on tax refunds and this denial does not render the remedy at law inadequate so as to warrant the exercise of equity jurisdiction by the Illinois courts. There is, therefore, no need to afford to these courts "the opportunity . . . to construe", *Id.* at 445, the Illinois Revenue Act under the present circumstances. On the other hand, §§1983 and 1341 are federal laws whose construction is not pre-eminently a matter of state concern.

[36] While it may be true that a district court injunction may prevent the petitioner Collector from going to judgment against taxpayer in his annual application for judgment and order of sale under 120 Ill. Rev. Stat. §§675 and 716 (1977), that is a summary proceeding in which the state court may only grant or deny refunds "as the right of the case may be." *Id.* §716. Even upon finding a challenged tax constructively fraudulent or constitutionally offensive, the Illinois courts in a §716 proceeding are without power to award interest, provide equitable relief or otherwise fashion a remedy to correct or forestall the harm (loss of interest) which threatens taxpayer. The Collector's application is therefore clearly not within the class of prior pending actions which raise *Younger* considerations.

The already noted uncertainties attending a concomitant equitable action, even under §1983, in the Illinois courts, *supra* 31-36, are compounded by unsettled questions regarding taxpayer's ability to return to the federal court in the event the Illinois courts decline to grant adequate relief. An unreserved tendering of federal rights to the state court in compliance with *28 East Jackson Enterprises, Inc.*, v. *Rosewell*, 55 Ill. 2d 420 (1970) and *28 East Jackson Enterprises, Inc.* v. *Cullerton*, 551 F.2d 1093 (7th Cir.), *cert. denied*, 434 U.S. 835 (1977); and *28 East Jackson Enterprises, Inc.* v. *Rosewell*, 63 Ill. App. 3d 880 (1st Dist. 1978), raises the prospect that taxpayer would be barred from returning to the federal court, see *England* v. *Louisiana Board of Medical Examiners*, 375 U.S. 411 (1964); *Sacks Bros. Loan Co., Inc.* v. *Cunningham*, 578 F.2d 172, 175 n.11; *Mr. Boston Distiller Corp.* v. *Pallot*, 469 F.2d 337 (5th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973), notwithstanding taxpayer properly invoked §1343(3) jurisdiction on an attempted return to the federal court. See *Mitchum* v. *Foster*, 407 U.S. 225 (1972).

the remedy at law provided by the state court is inadequate:

> "Although the existence of an adequate remedy at law barring equitable relief normally would be determined by inquiring into the remedies available in the federal rather than in the state courts . . . [under *Younger* principles] the inquiry was to be broadened to focus on the remedies available in the *pending state* proceeding." *Id.* at 441

That, however, is the very inquiry mandated by §1341 in tax cases and made by taxpayer in Point III of this brief. The Tax Injunction Act thus subsumes the policy concerns behind the *Younger* decision, *Id.* at 444 n. 8, so that a demonstration that the Illinois remedy is not plain, speedy and efficient for purposes of §1341 suffices to establish the inapplicability of *Younger*. Petitioners thus introduce a red herring by arguing §1341 is somehow at odds with *Younger*. The question is not whether the state courts have "wide berth" in tax matters, Br. 35, but rather whether the remedies they provide for constitutional abridgments in the revenue area are adequate. If they are not, as taxpayer argues, because of the failure to allow interest on refunds after long delays, no consideration of comity and no policy concerns behind §1341 preclude federal jurisdiction. If there is an "unseemly tug of war", Br. 36, it is not because of some inherent stress in our system of federalism but solely because Cook County, under color of Illinois law, is systematically, year after year, exacting an illegal tax from taxpayer and countless others, profiting therefrom by investment of the moneys wrongfully exacted. See 120 Ill. Rev. Stat. §675 (1977).

In fine, the holding in *Tully* v. *Griffin*, 429 U.S. 68, 73 (1976) that federal courts refrain from enjoining the collection of state taxes "except in cases where an asserted federal right might otherwise be lost", Br. 14, 19, 32, 39, in no way alters the settled law that a federal right is "lost" for purposes of Section 1341 when a state fails to

redress its abridgment by a plain, speedy and efficient remedy. The pervading question in this case is whether a no-interest remedy—the sole relief given by Illinois—can ever be considered adequate when habitual delay in the refund procedure and inexorable inflation cause the no-interest refund in real economic terms to be less, often far less than the illegal exaction. Unless settled concepts of value are to be ignored, the answer, perforce, must be that the no-interest remedy is inadequate and that taxpayer's asserted federal rights under the Fourteenth Amendment have been lost and will continue to be lost in the courts of Illinois absent federal, equitable relief. Fundamental fairness, not comity, is the real issue here. If Illinois chooses to be unfair, that is her right. But she cannot then complain as she does through the present petitioners when the federal courts, as contemplated by Sections 1343(3) and 1983, *Mitchum* v. *Foster, supra,* 407 U.S. at 242, and by Section 1341, *Hillsborough* v. *Cromwell, supra; Georgia R.R.* v. *Redwine, supra; Garrett* v. *Bamford, supra,* intervene to prevent that unfairness.

V.

CONCLUSION

For the above reasons, taxpayer prays that the decision of the court of appeals be affirmed.

Respectfully submitted,

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